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No. 80-

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD A. TURNER, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR RETRIAL WHERE THE ORIGINAL JURY VERDICT WAS SET ASIDE BY THE TRIAL COURT BASED ON A FINDING OF INTENTIONAL GOVERNMENT MISCONDUCT CONSISTING OF THE FALSE AND DECEPTIVE TESTIMONY GIVEN BY A GOVERNMENT AGENT UNDER OATH.

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DONALD A. TURNER, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Donald A. Turner, by and through his attorney, Neil H. Fink, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the lower court denial of his Motion To Dismiss The Indictment presently pending against him in the United States District Court for the Eastern District of Michigan. This Indictment charges conspiracy to possess with intent to distribute cocaine, aiding and abetting the distribution of cocaine, and the unlawful use of a communication

facility in violation of 21 USC §841(a)(1), 846 and 843(b) and was filed subsequent to an order of the District Court granting Petitioner a new trial after his conviction on the identical charges.

OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals filed September 11, 1980, affirming the District Court's denial of Defendant's Motion To Dismiss The Indictment, is reprinted in full as Appendix A hereto. That Opinion has not, as of this writing, been published.

JURISDICTION

The Opinion and Order appealed from was filed September 11, 1980. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, Donald A. Turner, was convicted on December 18, 1978, following a jury trial before the Honorable Julian A. Cook, Jr., of conspiracy to possess with intent to distribute cocaine, aiding and abetting the distribution of cocaine, and unlawful use of a communication facility, in violation of 21 USC §841(a)(1), 846, and 843(b).

Following conviction, a Motion For New Trial was filed alleging material and intentional government misconduct. On June 8, 1979, Judge Cook issued a written Opinion and Order granting this Motion For New Trial in the interests of justice based on his finding that a government agent deliberately and intentionally testified falsely, while under oath, during the course of the trial.

Thereafter, on July 18, 1979, Petitioner filed a Motion To Dismiss on double jeopardy grounds, asserting, specifically, that the government should be barred from retrying a defendant whose conviction is set aside upon a finding by the trial judge of deliberate and intentional government misconduct. Turner's Motion to Dismiss was denied on November 28, 1979. Appeal was taken to the United State Court of Appeals for the Sixth Circuit; the decision of the lower court was affirmed by the Court of Appeals on September 11, 1980.

REASONS FOR GRANTING THE WRIT

The decision below significantly undercuts Petitioner's Fifth Amendment right not to be twice put in jeopardy and raises an important constitutional question not previously

decided by this court, to-wit: whether retrial is barred following a reversal of Defendant's conviction based on the trial court's finding of deliberate and intentional government misconduct.

Following Appellant's conviction on cocaine-related charges, the lower court, on Petitioner's motion, ordered a new trial in the interests of justice. The trial judge specifically found that the Drug Enforcement Administration agent in charge of the case had intentionally and deliberately misrepresented and willfully failed to disclose certain information favorable and material to the defense.[1]

> In this case, Agent Gibbs not only failed to correct Blanchard's testimony but took the stand and by his own disclosure, buttressed Blanchard's testimony that no agreements or promises existed. Moreover, he made an affirmative material misrepresentation (if he did not outright perjure himself) that no promises or agreements existed. This was an affront to the Court's dignity and honor. It was an affront to the Nation. The government cannot make it's case through the deceptive testimony of its own agents. The Court does not believe that granting a new trial here is subject to criticism analogous to that directed at the exclusionary rule — the criminal goes free because of the constable's blunder. The culpable governmental conduct was cooly acted out in the very sanctuary of justice, not in the passion of the streets. Accordingly, we feel a new trial is essential. (Trial Court Opinion and Order Regarding Motion For New Trial, page 62).

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[1] Basically, that information involved the relationship between the government and a key government witness, Jack Blanchard, as it related to Blanchard's inducement to cooperate with government agents and to testify against Petitioner.

Despite its finding of intentional government misconduct, so grievous as to require the court to set aside Turner's conviction, the trial court erroneously concluded that reprosecution was not barred by double jeopardy, and, thus, erred in failing to grant Turner's Motion To Dismiss the second Indictment. Both the trial court, and the Sixth Circuit Court of Appeals in affirming the lower court's decision, ignored the fundamental principals of double jeopardy and failed to properly apply previous holdings of this Court.

While the exact issue raised herein has never been directly addressed by the Supreme Court, the position urged by Petitioner is merely an extension of the reasoning which underlies this Court's decisions in *United States* v *Jorn*, 400 US 470 (1971) and *United States* v *Dinitz*, 424 US 600 (1967).

The Double Jeopardy Clause of the Fifth Amendment provides that "no person shall be subject for the same offense to be put twice in jeopardy of life or limb." United States Const. Amend. V. This limitation is not only protection against multiple punishment for the same offense but is also a constitutional limit on the Government's power to prosecute. *Green* v *United States*, 355 US 184 (1957). As stated by the Supreme Court in *Green*, at 187-188:

> The underlying idea, one that is deeply ingrained in . . . the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

This Court has previously held that *intentional* misconduct on the part of the prosecution will be distinguished from other

forms of trial error for purposes of applying the double jeopardy bar. Specifically, in a line of cases focusing on the government's ability to retry a defendant after the original proceedings ended in mistrial, the Supreme Court impliedly carved out a "prosecutorial overreaching" exception to the general rule that double jeopardy would not bar retrial where mistrial is granted at the defendant's request. *See, Jorn, supra; Dinitz, supra.*

In *Jorn*, at 485 n. 12, the Court stated, "[W]here a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred." Subsequently, in *Dinitz*, at 611, the Court repreated this idea:

> The Double Jeopardy Clause does protect the defendant against governmental actions intended to provoke a mistrial request and thereby subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith conduct by judge or prosecutor,' (cites omitted) threatens the '[h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. (Cites omitted).

Explicit in these holdings is the Court's recognition of — "a defendant's valued right to have a trial completed by a particular tribunal." *Wade* v *Hunter*, 336 US 684, 689 (1949). And, further:

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by the judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a

declaration of mistrial. *United States* v *Jorn, supra*, at 485.

Later, in *Dinitz, supra* at 609, however, the Supreme Court acknowledged that this "valued right" may be of no value to a defendant once prejudicial prosecutorial misconduct has been interjected at trial.

> ... [I]t is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reveral is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause — the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

The basic reasoning of those cases is simple: A defendant has a right to his first jury and to do so without risking conviction in a potentially tainted proceeding — where, because of the interjection of *intentional* prosecutorial or judicial misconduct at trial, defendant has no choice but to request a mistrial, the defendant's right to go to his first jury is abridged and he should not be further harassed by successive trials.

Thus, the Supreme Court has already evidenced, through these cases, its unwillingness to subject a defendant to repeated prosecution when the situation was created, in the first instance, by deliberate misconduct. Petitioner submits there can be no logical distinction between those instances where, by good fortune, the defendant discovers the misconduct during trial rather than, as here, after. In other words, a

defendant who discovers following conviction that the proceedings were tainted by intentional government misconduct has been no less deprived of his right to go to his first jury. It is not the right to have the first jury decide which is alone significant; it is the right to go to that jury in proceedings free from governmental improprieties designed to avoid an acquittal. Where the defendant only discovers following conviction that he has been deprived of this right, he is no less entitled to the protections of the Double Jeopardy Clause.

Clearly, then, in applying double jeopardy concepts to the facts of the instant case, the question the Court must ask is not at what point in time did the defendant ask for relief from the tainted proceedings, that is, whether the defendant has requested a mistrial or a new trial, but, rather, what conduct precipated the necessity for relief.[2] In other words, the critical question is whether the claimed error constitutes "judicial or prosecutorial overreaching". As discussed above, the Supreme Court has clearly contemplated a distinction between prosecutorial or judicial error and judicial or prosecutorial overreaching.[3]

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[2] It cannot be argued that the Double Jeopardy Clause does not apply since the defendant took action of his own accord, in that it was the defendant who requested the new trial. The law is well settled that in cases of government misconduct, it does not matter who requested the new trial; the Double Jeopardy Clause will bar reprosecution regardless of the moving party. This is no more than a recognition that the government forced the defendant to take such action. *Jorn, supra.*

[3] This distinction is evidenced by the following language from *Jorn*, at 485: "Thus, where circumstances develop not attributable to *prosecutorial or judicial overreaching*, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by *prosecutorial or judicial error*. (Emphasis added).

The conduct condemned by the lower court in the instant case falls within the parameters of "prosecutorial overreaching" as this concept has been defined in subsequent cases wherein governmental misconduct was at issue. *See, United States* v *Kessler*, 530 F2d 1246 (5th Cir., 1976); *United States* v *Martin*, 561 F2d 135 (8th Cir., 1977); *United States* v *Alford*, 516 F2d 941 (5th Cir., 1975).[4] The lower court, and the Sixth Circuit Court of Appeals in affirming the lower court, failed to recognize that it is precisely this finding, that the governmental misconduct constituted "prosecutorial overreaching," which requires that reprosecution be barred.

The Court of Appeals for the Sixth Circuit held that when a conviction has been set aside for "errors or even misconduct" upon Defendant's request for a New Trial, the Double Jeopardy Clause would not apply. (Court of Appeals Opinion, at p. 2). In so holding, the Court relied solely on *Burks* v *United*

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[4] In *United States* v *Kessler*, 530 F2d 1246 (5th Cir., 1976), the Fifth Circuit Court of Appeals characterized the government's introduction of a known false exhibit as "intentional misconduct" and held that retrial of the defendants was prohibited by the double jeopardy clause. Relying on Justice Stewart's majority opinion in *United States* v *Dinitz, supra*, the Fifth Circuit fashioned the following criteria for "prosecutorial overreaching":

> To find "prosecutorial overreaching", the Government must have through "gross negligence or intentional misconduct", caused aggravated circumstances to develop which "seriously prejudice [d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction." *United States* v *Kessler, supra*, 15 1256 (Citations omitted).

Additionally, in the lower court, Judge Cook rebuffed the effort of the Assistant United States Attorney to assert that the conduct of the agent was non-prosecutorial. Citing *Giglio* v *United States*, 405 US 150 (1972), the Court held that the agent's conduct was attributable to the Government (Trial Court Opinion, at p. 42-43).

States, 437 US 1, 15 (1978) and *Gully* v *Kunzman*, 592 F2d 283 (6th Cir., 1979). Petitioner contends that those cases were improperly applied and not binding on the instant appeal.

Initially, the Sixth Circuit relied on *Gully, supra*, a recent decision of that court wherein it was held that a reversal obtained on other grounds than evidentiary sufficiency was no bar to retrial.

In that case, the Court reviewed a Habeas Corpus petition in which one petitioner had claimed that the Double Jeopardy Clause should bar retrial because the state's misconduct led to the reversal of his first conviction. Relying solely on *Burks* v *United States*, 437 US 1 (1978), the court responded, "Even accepting that charaterization of the trial error which caused the appellate reversal, it would not effect its state's right to retry him." *Gully*, at 289.

It is important to understand that the *Gully* opinion is bare of any facts concerning the act of misconduct alleged. Moreover, the Court's use of the phrase "even accepting that characterization" definitely implies that there is substantial doubt as to whether *any* prosecutorial misconduct was actually present. It, therefore, must be concluded that *Gully* was not a case involving *intentional* misconduct which would constitute "overreaching" as previously defined. Under the circumstances of that case, retrial would necessarily have been permitted even if the first trial had ended in mistrial — it is only "overreaching" (or intentional misconduct) which raises the double jeopardy bar.

Consequently, *Gully* is inapposite. The Sixth Circuit failed to recognize the distinction between *Gully* and the facts of the instant case.

As stated, both *Gully* and the Sixth Circuit opinion below relied, in turn, on *Burks, supra*.

In *Burks, supra*, the Supreme Court held that retrial would be barred where any reviewing court determines that conviction is not supported by sufficient evidence. The Court sought to distinguish evidentiary insufficiency from "trial error." In dicta, the Court described a reversal for "trial error" as a "determination that a defendant has been convicted through a process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions or prosecutorial misconduct." *Id.* at 15.

Petitioner contends that the error which he complained of below, intentional and deliberate governmental misconduct, stands on entirely different footing from mere "trial error" and must be analyzed and treated differently. The Supreme Court was not required, based on the facts of *Burks*, to distinguish or consider *intentional* misconduct. Petitioner suggests, therefore, that the language cited in *Burks* does not control in the instant case. Clearly, when a government agent willfully and deliberately deprives a defendant of a fair trial by conduct which the trial court suggests might be outright perjury and finds to be an affront to the court and the nation, the injustice cannot be reduced or belittled by terming it a "trial error". Though the Supreme Court referred to "prosecutorial misconduct," it should be distinguished from the kind of conduct the Supreme Court has previously referred to as "prosecutorial overreaching."

The Sixth Circuit failed to consider the difference between simple "trial error" and deliberate misconduct designed to prevent Defendant's acquittal. However, Judge Damon Keith, in his dissent, went right to the heart of the issue:

> I would bar retrial. We should not condone the deception and lies by a government agent as found by the court in this case by putting the defendant to the burden of another trial. (Court of Appeals Decision, at 3).

Petitioner's argument that reprosecution should be barred is supported not only by prior decisions of this Court, but by policy considerations underlying both the double jeopardy clause and the United States systems of jurisprudence as well.

Although it is ordinarily necessary to protect the public's interest in "fair trials . . . end[ing] in just judgments" *Wade* v *Hunter*, 336 US 684, 689 (1949), it is recognized that:

> Where 'prosecutorial overreaching' is present, the interests protected by the double jeopardy clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. This safeguard against 'prosecutorial overreaching' provided defendants by the Fifth Amendment's double jeopardy clause compliments 'the inestimable safeguard against . . . the overzealous prosecutor,' *Duncan* v *Louisiana*, 391 US 145, 156, 88 SCt 1444, 1451, 20 LEd 2d 491, 500 (1968) provided by a jury trial. *United States* v *Kessler, supra*, at 1256.

Obviously, then, the double jeopardy bar against reprosecution serves as a sanction against the government to discourage the very activity evidence in the case at bar.

In addition, when dealing with double jeopardy questions "an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process." *Jorn, supra*, at 485-86. Inarguably, the government did not adhere to these standards.

In *Ball* v *United States*, 163 US 662 (1886), one of the earlier authorities discussing double jeopardy and government misconduct, the court was concerned with the possibility that prosecution may take advantage of its own wrong. The court asked, "if this practice be tolerated, when are the trials of the accused to end?"

Because of the deliberate and intentional act of the government agent in misrepresenting and suppressing material information, Donald Turner was deprived of his right to a fair trial — a trial before his original tribunal which had the opportunity to decide the merits of his case based on undistorted, untainted evidence. While it is true that his case was decided, technically, by his first jury, it cannot be said that his conviction did not result from the government's deliberate perversion of the proofs. By its intentional misconduct, the government "chose" to destroy its opportunity to convict Turner at the original trial.

Deliberate and intentional governmental misconduct cannot be tolerated; such practice "undermines and subverts the judicial idealism of our democracy." *United States* v *Butler*, 567 F2d 885, 893-94 (9th Cir., 1978) (concurring opinion). Where such unconscionable conduct is discovered, whether during or after trial, reprosecution must be barred. The Double Jeopardy Clause surely contemplates safeguarding a defendant against overzealous prosecution and more surely contemplates protecting him from the embarrassment, expense, and ordeal of a successive prosecution which is occasioned only by the government's willful and deliberate contamination of the trial process.

This Court is only asked here to extend the protection of the Double Jeopardy Clause, now afforded a defendant whose first trial ends in a mistrial following a finding of intentional misconduct, to a defendant whose conviction has been reversed upon the same finding. The considerations are the same: the government's conduct cannot go unsanctioned, and the defendant's rights must be protected. To refuse to bar a retrial, in the case at bar, would do violence to all ideas embraced in the double jeopardy protection.

> . . . society's awareness of the heavy personal strain which a criminal trial represents for the individual

> defendant is manifested in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest and enforcement of criminal laws. *Jorn, supra*, at 479.

Can this Petitioner be forced to bear the heavy burden of retrial simply because he was not fortunate enough to discover the government's misdeeds during trial? While admittedly, Petitioner did have "the right of being hung to protect him from danger of a second trial," *United States* v *Scott*, 437 US 82, 92 (1978), is his election to seek a new trial any more of a "choice" than the election to seek a mistrial? Is the government's intentional misconduct any less egregious, discovered after trial rather than during trial? Clearly, these questions deserve a negative answer.

CONCLUSION

In Donald Turner's case, the government was given its "one fair opportunity" to present all true evidence against him during his original trial in December of 1978. The government chose not to use this opportunity fairly, and deliberately failed to disclose evidence which the trial court determined to be material and favorable to the defense. The government is not entitled to a second chance to convict him. More importantly, he is entitled to the protections of the Double Jeopardy Clause of the Fifth Amendment. Retrial must be barred, the the Indictment pending against him must be dismissed.

Respectfully submitted,

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APPENDICES

APPENDIX A

ORDER OF THE COURT OF APPEALS
(Filed September 11, 1980)

NO. 79-5435
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD A. TURNER,
Defendant-Appellant.

Before: ENGLE and KEITH, Circuit Judges and
BALLANTINE, District Judge*

On December 18, 1978, appellant Donald A. Turner was found guilty following a jury trial of conspiring to possess with intent to distribute and to distribute approximately 2.2 pounds of cocaine, of using a communication facility to facilitate possession with intent to distribute and distribution of cocaine, and of aiding and abetting another to possess with intent to distribute cocaine.

On December 26, 1978, Turner filed a motion for judgment of acquittal and a motion for a new trial contending

* Hon. Thomas A. Ballantine, United States District Judge for the Western District of Kentucky, sitting by designation.

that his conviction was tainted by the misconduct of a special agent of the Drug Enforcement Administration. Specifically, Turner alleged that the agent has testified falsely at his trial in denying that the chief government witness, Jack Blanchard, had been promised leniency in exchange for his testimony at Turner's trial. On the strength of this assertion, the district judge, in an unpublished opinion dated June 8, 1979, set aside the jury verdict and ordered a new trial, but, at the same time, denied the defendant's motion for a judgment of acquittal. The government asked for a rehearing to review this order, but Judge Cook denied the motion. The government subsequently petitioned this court for a writ of mandamus seeking reversal of the district court's new trial order. This court issued an order on October 12, 1979, denying the writ. No. 79-1410.

Before the government sought the writ of mandamus, the defendant filed a motion to dismiss on the basis of double jeopardy but Judge Cook delayed decision on this motion pending disposition of the government's appeal. Following the denial of the writ, Judge Cook refused to dismiss the indictment. In his appeal, Turner asserts that the Double Jeopardy Clause of the Fifth Amendment prevents retrial where the original verdict was set aside because of the alleged intentional misconduct of the government agent.

Upon consideration of the entire record, the court is of the opinion that the Double Jeopardy Clause does not bar retrial of a defendant whose conviction has been set aside not because of insufficiency of the evidence, but for errors or even misconduct on the part of the government. *Burks v. United States*, 437 U.S. 1, 15 (1978); *Gully v. Kunzman*, 592 F.2d 283 (6th Cir. 1979). Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

KEITH, Circuit Judge, dissenting. I would bar retrial. We should not condone the deception and lies by a government agent as found by the court in this case by putting the defendant to the burden of another trial.

APPENDIX B

PORTION OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN REGARDING MOTION FOR ACQUITTAL AND MOTION FOR NEW TRIAL

(Filed June 8, 1979)

Criminal Action
No. 78-80240

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. Criminal Action

DONALD A. TURNER,
Defendant.

---

* * *

MOTION FOR NEW TRIAL BECAUSE OF GOVERNMENTAL MISCONDUCT

Defendant asserts Governmental misconduct as the final ground for granting a new trial.

I

JURISDICTION

The Government attaches great significance to its argument that the Defendant has failed to raise the issue of Governmental misconduct within the seven days mandated by Fed.R.Crim.P. 33. It is true that if a Motion for New Trial under the Rule is not made within seven days, the only grounds that can be asserted is that of newly discovered evidence. This is because the time limits of Rule 33 are jurisdictional, and the District Court is not empowered to extend the time to file the Motion unless a request to extend is made and the Court acts upon that request within the seven day period. *United States v. Smith*, 331 U.S. 469, 473-76 (1947); *United States v. Bernan*, 546 F.2d 1316, 1318 & n.1 (8th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977).

Ascertaining, at the outset of our analysis a resolution of the question as to whether the issue of Governmental misconduct has been properly raised within seven days is important because it may be determinative of what standard to utilize and apply. In a Motion for New Trial based upon newly discovered evidence, four very difficult and exacting factors has traditionally been required: namely, (1) the newly discovered evidence must be unknown to the Defendant at the time of trial; (2) the evidence must be material and not merely cumulative or impeaching; (3) the evidence's production must in all probability lead to an acquittal; and (4) failure to learn of the evidence must not be due to a lack of diligence on the part of the Defendant. *See United States v. Rachal*, 473 F.2d 1338, 1343 (5th Cir. 1973); 2 Wright & Miller, § 557 at 515 & n.95.

Motions for New Trial based upon newly discovered evidence are not favored and are seldom granted. *United*

States v. Garner, 529 F.2d 962, 969 (6th Cir. 1976). It is also clear that there is a much greater burden which is requisite upon the moving party who bases his Motion for New Trial upon newly discovered evidence than if he bases that Motion upon other grounds raised within seven days of the verdict. *See United States v. Ellison*, 557 F.2d 128, 133-34 & n.3 (7th Cir. 1977); *United States v. Rachal*, 473 F.2d at 1343. However, Motions for New Trial based upon Governmental misconduct seem to be distinct from Motions for New Trial based upon newly discovered evidence even when the same facts give rise to these alternative theories of relief. *See United States v. Garner*, 529 F.2d at 968-69.

Is the Government correct in stating that the Motion for New Trial based upon Governmental misconduct was not raised within seven days as required by Rule 33, and therefore, it must be taken by the District Court as a Motion based upon newly discovered evidence?

The jury returned a verdict of guilty on December 18, 1978. Computation of time is governed by Fed.R.Crim.P. 45(a), which is substantially the same as Fed.R.Civ.P. 6(a) governing time computation in civil cases. See Fed.R.Crim.P. 45(a) Advisory Committee Note. The first sentence of Rule 45(a) provides, "in computing any period of time the day of the act or event which the designated begins to run shall not be included." Hence, the first day of the allotted seven days was December 19, 1978; the seventh day was December 25, 1978. The Motion for Acquittal and the Motion for New Trial were filed on December 26, 1978 — the eighth day. Notwithstanding this, the Motion was timely filed because "the last day of the period so computed shall be included, unless it is a . . . legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday." December 25, 1978 was Christmas Day — a "legal holiday" explicitly recognized by Rule 45(a).

Paragraph 8 of the first pleading filed on December 26, 1978, and captioned "Motion for New Trial" read as follows:

> A new trial is required in the interest of justice. The grounds for a new trial, mentioned above, are more fully set out in the attached memorandum of facts and authorities.
>
> Defendant respectfully requests leave to file a supplemental memorandum of facts and authorities at such time as the remaining trial transcripts become available.

That pleading was supported by a brief, filed at the same time, and entitled "Memorandum of Facts and Authorities." On Page 5 of that document, the Defendant alleged the following:

> In the present case, the Defendant contends that a new trial is required in the interest of justice. This claim includes, but is not limited to governmental misconduct. As the trial transcripts are of paramount importance, thorough discussion of the grounds must await receipt of the remainder of the transcripts.

The Court believes the Government's contention that the Motion was untimely goes to the supplementary memorandum filed on February 2, 1979, and captioned "Supplemental Motion for a New Trial." Attached to that Motion was a pleading entitled "Memorandum in Support of Supplemental Motion for a New Trial." The Court also takes the Government's contention to be that these supplemental pleadings are, in effect, amendments to the Motion for New Trial or should be received as an all together New Motion & Brief in support. There is case authority indicating that such amendments are not permissible under Fed.R.Crim.P. 33, and, that, therefore, the Court is precluded from reviewing such

pleadings except as they raise grounds for a new trial alleging newly discovered evidence.

As noted earlier, Rule 33 requires a Motion for New Trial (other than on grounds of newly discovered evidence) be brought within seven days. Moreover, it has been held that "the same limitations apply to statement of grounds for a new trial." *United States v. Dansker*, 561 F.2d 485, 486 (3rd Cir. 1977); *United States v. Newman*, 456 F.2d 668 (3rd Cir. 1972). *See also United States v. Ellison*, 557 F.2d 128, 133 (7th Cir. 1977). These limitations are jurisdictional. Therefore, if we determine that the Defendant did not adequately "state the grounds for a new trial" in his December 26, 1978, pleadings, then, according to these authorities we are without authority to consider such supplemental pleadings except as they allege grounds for granting a new trial based on newly discovered evidence.

Third Circuit cases, some of which have been cited above, indicate that there may be real jurisidictional problems with a party making a timely Motion under Rule 33 but then attempting, after the seven days have elapsed, to supplant the Motion. *United States v. Dansker*, 561 F.2d at 586; *United States v. Newman*, 456 F.2d at 669-72; *United States v. Hamilton*, 457 F.2d 95, 99-100 (3rd Cir. 1972). *Hamilton* and *Newman* both present fact situations which deserve our attention.

In *Hamilton*, the Defendant made a timely Motion for a new trial and included a clause in it that purported to reserve to him "the right to file additional and supplemental reasons for a new trial when the notes of testimony taken at the trial had been transcribed and a copy thereof made available to counsel for the Defendant." This, in some respects, is similar to what Turner did in his December 26, 1978, Motion. However, there are some important distinctions. In *Hamilton*, the trial judge denied the Defendant the right to

pursue the supplemental reasons for a new trial, and the Circuit Court affirmed, characterizing this clause an "omnibus reservation clause." The Court of Appeals went on to state, "the reservation clause in his motion did not state any reasons for a new trial. The trial judge's decision not to take action beyond such time limitation was correct because any order entered would have been without effect." Nevertheless, the Circuit Court considered those reserved issues and found them devoid of merit. The Turner Motion and Memorandum in Support thereof (dated December 26, 1978) specifically stated that he was raising a Governmental misconduct issue. This specific allegation is not comparable to the type of omnibus reservation clause involved in *Hamilton*.

In *United States v. Newman*, 456 F.2d 668, the Government successfully obtained a Writ of Mandamus to compel the District Court to vacate its order granting a new trial. The Court of Appeals said that the order was not entered for reasons raised by the Defendant in his timely Motion for a New Trial but for reasons raised by the District Court on its own Motion. The Circuit Court said that District Courts do not have the power under Rule 33 to grant a new trial on their own Motion. The Rule specifically provides the Court, *"on motion of the defendant"* may grant a new trial if required in the interests of justice. Clearly, *Newman* is distinguishable. The Court is not ruling upon a Motion for a New Trial on grounds it raises, but rather upon a ground raised by Turner in his December 26, 1978, memorandum.

Other Third Circuit District Court cases seem to be distinguishable for similar reasons. In *United States v. Mathews*, 335 F. Supp. 157, 166 (W.D. Pa. 1971) a Motion for New Trial suffered from having an omnibus reservation clause like the one in *Hamilton*. Also, *United States v. Kane*, 319 F. Supp. 527, 528 (E.D. Pa. 1970) involved raising an additional ground without proper extension. *United States v. Dabney*, 393 F. Supp. 529, 548 (E.D. Pa. 1975) found an ad-

ditional ground improper because it was raised orally (although raised in the appropriate time for granting an extension) and, therefore, defective under Fed.R.Crim.P. 47. What is involved here is a request and statement of grounds made in writing.

Accordingly, we believe that Turner has complied with the requirements of Rule 33 as the Motion relates to Governmental misconduct. Even in the Third Circuit, it would appear that the trial court has discretion whether to postpone the filing of the particulars relating to a given ground for a new trial. *United States v. Williams*, 254 F.2d 253, 254 (3rd Cir. 1959). It is a matter of discretion what we characterize to be a "ground" raised in a timely fashion, or a "Motion" made, in a timely fashion. This Court concludes that the document, although captioned "Supplemental Motion for a New Trial" and filed on February 2, 1979, is simply a memorandum stating facts supplanting the December 26, 1978 "Motion for a New Trial" based on the ground of Governmental misconduct. We also note that Turner moved the Court to grant him leave to file a supplemental memorandum of fact and authority at such time as the remaining trial transcripts became available to him (December 26, 1978 "Motion for New Trial" at 2). The Court, through oral communication with the counsel for Turner via a staff member, indicated that it would permit him that additional time.

It could be argued that in order to file such a supplemental memorandum the Court would have to enter an Order. Such an argument would be premised upon Fed.R.Crim.P. 45(b) requiring the Court to order any enlargement of time when an act is required to be done within a specified time. Moreover, Rule 45(b) provides that the Court may not extend the time for taking action under Rule 33. The Court believes Rule 45(b) does not inhibit consideration of the supplemental pleadings because we believe there was full compliance with Rule 33. Turner filed his "Motion for New Trial" and stated

the specific grounds in a timely fashion. The Court merely granted Turner's request to file supplemental pleadings. By simply granting the Defendant a right to file supplemental pleadings, when the prior pleadings had fully stated the grounds upon which relief was requested, there was no necessity for entry of an order.

II

APPLICABILITY OF TRADITIONAL REQUIREMENTS REGARDING GRANTING A NEW TRIAL ON MOTION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

After having walked through the jurisdictional maze related to Motions for New Trial and because we have concluded the Motion (as it relates to Governmental misconduct) was raised within seven days, this Court has reached the conclusion that the request for a new trial based upon Governmental misconduct may be granted if it is determined "to be in the interest of justice." *See* Moore's Federal Practice Para. 33.02[1] at 33-3 & n.1 (1965). We note, however, that most of the case authority dealing with Governmental misconduct requires a showing of specific criterion, since since the challenge is ordinarily of a Constitutional character. Even if we were to consider this to be a Motion based upon newly discovered evidence, however, it would not be necessary for the movant to make out the four elements traditionally required if the defect were of a Constitutional magnitude.

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason, the Defendant should not have to satisfy the severe burden of demonstrat-

> ing that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Augers, 427 U.S. 97, 111 (1976).

In view of this language, I think that the Government's citation of *United States v. Cararella*, 588 F.2d 1204 (8th Cir. 1978) is inappropriate for two reasons. First, Constitutional errors (denial of due process) have been argued here. Second, we have concluded the Motion was made within seven days. To the extent that *Cararella* is read as overlooking the above cited language of *Augers*, it has to be disregarded. Other Circuits have relaxed the traditional elements regarding a motion for new trial based upon newly discovered evidence when governmental misconduct is avered. *United States v. Butler*, 567 F.2d 885, 889-90 (9th Cir. 1978); *United States v. Sutton*, 542 F.2d 1239, 1242 & n.3 (4th Cir. 1976). This Court, therefore, is of the belief that making out the traditional elements of a new trial based on newly discovered evidence is not necessary (a) if the motion is made before the seven days have run, or (b) if the alleged error is of a constitutional nature, or, even, perhaps (c) if the motion is based upon the mere allegation of governmental misconduct. (Given our determination that the motion was made within seven days, consideration of the third proposition is not necessary here).

We have further narrow our focus as to the test for granting a new trial based upon an allegation of Governmental misconduct to the following propositions:

(1) It is not necessary for Turner to make out the rigorous factors traditionally required to obtain a new trial based upon newly discovered evidence,

(2) Allegations of Governmental nondisclosure of exculpatory evidence may constitute a denial of due process. *Brady v. Maryland*, 373 U.S. 83 (1963),

(3) The standard for ascertaining whether there has been a denial of the process because of nondisclosure of promises made to a witness is governed by *Giglio v. United States*, 405 U.S. 150 (1975) and a line of subsequent cases,

(4) We can grant a new trial if we determine such to be "in the interest of justice." There may be circumstances where a trial does not violate minimum threshold Due Process guarantees of a Defendant, but "the interests of justice" mandate retrial. However, to the extent that we consider the Defendant's Motion for New Trial, we will first consider it in terms of a denial of Due Process.

III

PROCEDURAL AND EVIDENTIARY CONCERNS

Allegations of Governmental misconduct here relate to two areas:

(1) The alleged suppression of the reverse side of Government's Exhibit 4 (a sheet of paper upon which Jack Blanchard wrote instructions from John Keith DeSmyter) and the reverse side of Government's Exhibit 9 (taped conversations between Turner and Blanchard).

(2) The alleged suppression of information regarding Governmental leniency shown to Blanchard.

Because the second is the more serious contention, we shall address it first. The Defendant argues that the Government kept vital information from the defense regarding the nature and extent of its relationship with the witness Blanchard. At various points in the Defendant's pleading, it is asserted that this was accomplished by (1) the perjury of the witness Blanchard, (2) the perjury, or at least the material misrepresentations of D.E.A. Agent Steven Gibbs, and (3) the conduct of Mr. Christopher Andreoff, the Assistant United States Attorney in charge of the *Turner* case. To begin with, we must ascertain what evidence is alleged not to have gone to the jury, or what evidence is alleged to have gone to the jury in a distorted form. The only way to do this is to compare what evidence, in fact, went to the jury with the evidence that the Defendant alleges gives rise to a Constitutional violation under *Giglio*.

A.

General Burden on Movant

First and foremost, we realize that on a motion for new trial, the burden is clearly upon the Defendant movant. He is the party attacking a jury verdict that is presumptively valid. *United States v. Gross*, 375 F. Supp. 971, 973-4 (D.N.J. 1974). The extent of the burden may vary given the nature of the grounds alleged for new trial, but the burden of persuasion is always upon the movant. *See United States v. Augers*, 427 U.S. 97; *United States v. Butler*, 567 F.2d at 887 (production of substantial new evidence); *United States v. Sutton*, 542 F.2d 1239, 1241-42 & n.3 (4th Cir. 1976). *See also United States v. Mackin*, 561 F.2d 958, 961 (D.C. Cir.), *cert. denied*, 98 S. Ct. 490 (1977) (As to perjured testimony, to grant a new trial under the *Larrison* standard, a "court must be reasonably well satisfied that the testimony given by a

material witness is false,"); *United States v. Wayman*, 510 F.2d 1020, 1024 (5th Cir. 1975) (to gain new trial on the basis of impartial jury, the Defendant is burdened to show bias by a preponderance of evidence).

B.

Hearing

The Defendant sought an Evidentiary Hearing on his Motion for New Trial. Whether or not the Court grants a hearing to the movant is a matter of discretion. *United States v. Ward*, 544 F.2d 975, 976 (5th Cir. 1976). Such a motion can be decided on affidavits alone. *United States v. Johnson*, 327 U.S. 106 (1945); *United States v. Hoffa*, 382 F.2d 856, 864-65 (6th Cir. 1967). Even when Governmental misconduct of some type is alleged, it is not improper for the District Court to waive a hearing and decide the matter on affidavits. *United States v. Nace*, 561 F.2d 763, 772 (9th Cir. 1977). However, there are limits to this discretion, especially when Governmental misconduct is alleged. An Evidentiary Hearing may be necessary to insure an adequate record upon which to base an enlightened ruling. *United States v. Disston*, 582 F.2d 1108, 1110-12 (7th Cir. 1978).

C.

Evidence

We granted the Request for an Evidentiary Hearing and even adjourned that hearing based upon the representation of Turner that further investigation was necessary for a complete presentation of his position. On the date of the hearing, both the parties told the Court that they wished to proceed by way of affidavit and would offer no testimony or other evidence.

Therefore, what the Court has precisely before it is (a) its own record of the trial, transcript and exhibits, and (b) two affidavits. One affidavit is that of Ms. Lurana S. Snow, Blanchard's defense counsel in a criminal proceeding in the United States District Court for the Southern District of Florida, *infra*; the other being a counteraffidavit of Mr. Christopher Andreoff, the Assistant United States Attorney in charge of this case. This is the only evidence from which we can make a determination as to whether the Defendant has sustained his burden. *See United States v. Osborn*, 412 F.2d 1021, 1025 (6th Cir. 1969). It may be that an affidavit, even taken at face value, cannot provide support for suggestions made in a brief. If such support is essential to sustaining the burden imposed, then the motion must fail. *United States v. Nickells*, 552 F.2d 684, 687 (6th Cir. 1977).

IV

FINDINGS RE AGENT GIBBS' MISCONDUCT

We next come to the knotty problem of determining just what, in fact, these affidavits and the record establish. Let us look first to the averments made in the affidavit of Ms. Snow as they relate to the role that Special D.E.A. Agent Steven Gibbs played in the case of *United States v. Blanchard*, Case No. 78-129-CR (S.D. Fla. 1978).

Ms. Snow was a public defender appointed to represent Blanchard. (Snow Aff. Para. 1 & 2). She also avered that her client had agreed to cooperate with the D.E.A. immediately following his March 25, 1978, arrest and to participate in a "controlled' delivery of cocaine to Detroit. (Snow Aff. Para. 3). The testimony of both Blanchard (12/11/78 Tr. at 22-23) and Gibbs (12/8/78 Tr. at 22) are in accord.

However, the remainder of Ms. Snow's affidavit relating to Gibbs' activity varies significantly from Gibbs' trial testimony.

Ms. Snow indicated that shortly after her client's arrest, she had a telephone conversation with Gibbs. (Snow Aff. Para. 4). According to her Affidavit, he communicated the following to her at that time: (1) He was the agent in charge of the *Blanchard* case (Snow Aff. Para. 4); (2) Due to the nature and extent of Blanchard's cooperation, he would recommend probation if the D.E.A. was successful in apprehending a certain person in Santa Cruz, Bolivia involved in illicit cocaine importation (Snow Aff. Para. 4); (3) If the D.E.A. was unsuccessful in apprehending that person, the D.E.A. would recommend a sentence not to exceed one year imprisonment (Aff. Para. 5). Ms. Snow further avered that she had several conversations with Agent Gibbs regarding the success of the D.E.A. in apprehending the individual in Bolivia (Snow Aff. Para. 6) and that, on one occasion, Agent Gibbs indicated (1) such a person had been apprehended, and (2) therefore, the D.E.A. would recommend probation for Blanchard (Snow Aff. Para. 7).

The testimony of Agent Gibbs is very different. On direct examination, he testified to the following: (1) no overtones as to leniency were made to Blanchard after he agreed to cooperate (but prior to his making a statement) (12/8/78 Tr. at 22-23); (2) he and Agent Miller made no promises to Blanchard except that they would, and did, communicate his (Blanchard) cooperation to the United States Attorney's Office in Florida (12/8/78 Tr. at 23-24); (3) to the best of his knowledge, no agreements relative to jail exposure were in existence prior to Blanchard's tender of a guilty plea (12/8/78 Tr. at 25).

On cross-examination, Gibbs testified that (1) the only thing that was done for Blanchard was a dismissal of one of the two counts of the Indictment (12/8/78 Tr. at 39); (2) He stated this was the normal practice in the Southern District of Florida when someone plead guilty, and also that (3) this was

the only thing the D.E.A. *could* do for Blanchard (12/8/78 Tr. at 39); (4) Gibbs further stated that, to the best of his knowledge, this was the only thing the United States Attorney's Office was authorized to do for Blanchard (12/8/78 Tr. at 40). (5) He did admit on cross-examination that the Assistant United States Attorney in Florida went to the Judge with a recommendation of probation (12/8/78 Tr. at 40). By contrast, Ms. Snow, in her affidavit, stated that the United States Attorney's Office in Miami recommended probation to the Florida District Court, but only reluctantly and only in view of the promises Gibbs had made to the Defendant (Snow Aff. Para. 8).

Stated simply, Ms. Snow's affidavit requires we make a factual determination as to whether or not Agent Gibbs promised her and/or Blanchard that the D.E.A. would recommend probation in the *Blanchard* matter.

First, we note that there is no evidence before us that Gibbs ever communicated any such promise of leniency (if one in fact existed) directly to Blanchard. Indeed, Ms. Snow's affidavit can be read to infer the contrary. "That at no time whatsoever were any of the plea bargain negotiations or discussions carried on by anyone other than Special Agent Gibbs and myself." (Snow Aff. Para. 10). Consequently, any allegations regarding Blanchard's knowledge of any promises that Gibbs may have made, no matter how inferentially compelling, are unsupported by the limited amount of evidence before us. In view of this, we have no means of determining if Blanchard committed perjury when he testified that, to his knowledge, no agreements existed. (12/11/78 Tr. at 74).

Nevertheless, the Court feels compelled to accept the averments of Ms. Snow that Gibbs did promise *her* that Blanchard would receive a recommendation of probation from the D.E.A. We adopt this finding in view of two factors: (1) This was the recommendation that was eventually made to the

Florida Court by the Government; (2) Ms. Snow is a person completely disinterested in the present litigation. She had nothing to gain (and a great deal to lose) by fabricating a false affidavit. On the other hand, Gibbs, as a D.E.A. Agent, is an interested person. Additionally, the fact that Blanchard was not sentenced until after he had testified (irrespective of any alleged involvement of the United States Attorney's Office in this District to secure an adjournment of his sentencing) further buttresses the proposition that some arrangement between the D.E.A. and Blanchard's defense counsel had been consummated.

V

LEGAL CONCLUSIONS RE AGENT GIBBS MISCONDUCT

A.
Antecedent Concerns

Before analyzing what standard should apply or what burden the Defendant must meet, we must address three antecedent problems. First, is it fatal to the request for a new trial based upon Governmental misconduct that there has been no showing Blanchard knew of any leniency arrangements made between his counsel and Agent Gibbs? Second, does the fact that the subject of the alleged misconduct (Agent Gibbs) is not a prosecutor defeat application of *Giglio*? Third, does the fact the jury knew something about (but not the entire extent of) the leniency shown Blanchard defeat proffer of a Government misconduct allegation?

1.

Necessity of the Witnesses Knowledge of the "Deal"

Most cases relating to the Government failing to disclose promises of leniency involve perjury of a witness. For example, in *Giglio*, a co-conspirator witness had received an undisclosed promise of immunity from a United States Attorney and testified that no promise of immunity existed. The United States Attorney who tried the case was apparently unaware of the bargain struck between the witness and his fellow prosecutor and never connected the false statement. The Court reversed holding, *inter alia*, that the prosecutor's office was one entity and a promise made by one of its attorneys must be attributed to the Government.

When the undisclosed bargain or promise is never communicated to the witness, the Government argues *Giglio* is inapplicable. The Fourth Circuit Court of Appeals is in sharp disagreement with such an assertion. In *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979), the State prosecutor asked one Lewis Miller, an accomplice of the Habeas Corpus Petitioner, Campbell, if he knew whether any plea agreement had been arranged between himself and the State. He truthfully responded there was not. The prosecutor had, in fact, arranged a plea agreement with Miller's attorney but attached a caveat request that the attorney not communicate this to his client until after Miller testified at Campbell's trial. The Fourth Circuit observed:

> The fact that Miller was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectations of favorable treatment. As we noted in *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976), a tentative promise of leniency might be interpreted by a witness as contingent upon the

> nature of his testimony. Thus, there would be a great incentive for the witness to make his testimony pleasing to the prosecutor. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with Miller after Campbell was convicted.

Campbell v. Reed, 594 F.2d at 7-8.

As noted earlier, there is no evidence before us that Blanchard knew of the promises made by Agent Gibbs to Ms. Snow. However, under *Campbell*, this is not fatal. In fact, the Fourth Circuit has indicated that under such circumstances, the credibility of a witness is even more suspect when he has occasion to believe that leniency is contingent upon his testimony. Therefore, whether Blanchard knew of the agreement is not requisite to Turner asserting Governmental misconduct. The Government cites other case authority as requiring a showing of the witness' knowledge of the agreement. *See United States v. Ramos-Algarin*, 584 F.2d 562, 564 (1st Cir. 1978); *United States v. DiCarlo*, 575 F.2d 952-60 (1st Cir. 1978); *United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978). All of these cases, however, did not involve facts indicating that the promises were communicated to counsel for the witness. They, therefore, are clearly distinguishable. Those Courts did not have before them the precise issue faced in *Campbell* and with which we are now confronted.

The Court believes the reasoning of *Campbell* represents a realistic understanding of the variety of ways in which Government misconduct can occur. The state prosecutor in the Campbell case tried to "outfox" the Petitioner and Petitioner's counsel, and, additionally to avoid his own duty. By communicating about the plea agreement with the witness' lawyer rather than the witness, the prosecutor thought that he

would escape the reach of *Giglio* as well as secure supportive testimony by dangling the hoped-for leniency as a carrot.

2.

Agent Gibbs Non-Prosecutorial Status

We next address Agent Gibbs non-prosecutorial status as defeating an allegation of Governmental misconduct. In *Giglio*, the Court said:

> The prosecutors office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency § 272.

Giglio v. United States, 405 U.S. 150, 154 (1972). Ms Snow avers (Snow Aff. Para. 8) that the United States Attorney's Office in the Southern District of Florida honored the promises of Agent Gibbs, and, therefore, it necessarily follows that the United States Attorney's Office in that District was well aware of the promises that Gibbs made regarding Blanchard. Therefore, under the reasoning of *Giglio*, the United States Attorney's Office in Detroit is vicariously charged with the knowledge of its sister office, irrespective of any actual knowledge Mr. Andreoff may or may not have had regarding the arrangements.

Additionally, even if the United States Attorney's Office in Florida had not been involved, and had not known of Gibbs' activity, we think that the agency principles announced in *Giglio* extends to Government agency as well as prosecutors. The Ninth Circuit has recently extended the principles of *Giglio* to Government agents:

> The district court found that Durden and the agents had failed to disclose to the jury in the Butler

> trial the assurances the agents had made to Durden in return for his agreement to cooperate with the prosecution. The prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if such promises by other government agents were unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964).

United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978).

> Never once did the agents hint at the full complement of assurances given to Durden. Even if the United States Attorney's Office were totally ignorant of the agents' activities and deceptions, the Government still remained responsible for any and all of their actions. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). The agents were nothing less than "an arm of the prosecutor," *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975).

Id. at 892 (Ely, J., concurring).

Clearly, the Government is charged with the misconduct of its agents when under a *Giglio* attack.

3.

Cumulative Nature of Undisclosed Evidence

The Government's most serious rebuttal argument to a finding of Governmental misconduct relates to the undisclosed evidence as being cumulative. The Government enumerates several instances where, on direct and cross-examination of Blanchard, Blanchard's relationship with the Government

was extensively explored. (Government's Memorandum in Support of Answer to Defendant's Supplemental Motion for New Trial at 28-29). Most significant are the following:

(1) The record is replete with evidence that Blanchard agreed to cooperate with the D.E.A. with the hope of securing some leniency (12/11/78 Tr. at 22-23, 69, 70, 102-102);

(2) Blanchard knew of the Florida United States Attorney recommending probation or dismissal of one count of a two count Indictment when he plead guilty (12/11/78 Tr. at 24) [Agent Gibbs' testimony also established that the United States Attorney in Florida recommended probation when Blanchard plead guilty (12/8/78 Tr. 2t 40];

(3) Blanchard, at the time he testified at Turner's trial still expected that his cooperation might be communicated to the sentencing judge by the D.E.A.

The Government argues that in none of the cases cited by the Defendant did the witness testify to substantial promises of leniency. The contention is that, *arguendo*, a finding of improper Governmental conduct, Blanchard's testimony, or for that matter the entire record, more than sufficiently establishes the nature and extent of the witness' relationship with the Government. We think this contention goes to the heart of the standard for granting a new trial based upon Governmental misconduct and, therefore, this Court will briefly explore that standard.

B.

STANDARD FOR GRANTING NEW TRIAL BASED ON GOVERNMENT MISCONDUCT

1.

Giglio

Brady v. Maryland, 373 U.S. 83 (1963) established the principle that prosecutors have an affirmative duty to disclose material exculpatory evidence. In *Giglio v. United States*, 405 U.S. 150, the Court applied Brady to a failure to disclose agreements struck between a witness and the Government, and further found that a new trial was mandated "if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'" *Giglio v. United States*, 405 U.S. at 154.

In *Augers v. United States*, 427 U.S. 97 (1976), the Court again addressed the area of the Government's failure to disclose exclupatory evidence. The Sixth Circuit has recently discussed *Auger*:

> The [Augers] Court articulated three different standards for reviewing the materiality of undisclosed information, the applicable standard dependent upon which of the three types of factual situations is presented. The first type of factual situation is where the prosecution has employed testimony which the prosecution knew, or should have known, was perjurious. The Court noted at 103, 96 S.Ct. at 2397 that in such a situation the conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."
>
> The second type of situation is exemplified by the Brady case wherein the defense makes a specific request for certain evidence. The Court noted at 04, 96 S.Ct. at 2397 that in such a situation "Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

> The third type of situation is where, as in Augers, the defense has made no request for exculpatory evidence, or, as in the present case, the defense has made only a general request, for exculpatory, or favorable evidence. The Supreme Court noted at 107, 96 S.Ct. at 2399 that there is "no significant difference" between a situation where there . . .
>
> The Court further explained the standard of materiality where there has been a general request or no request, stating that a denial of due process will be found only where "the omitted evidence creates a reasonable doubt" as to the defendant's guilt.

Wagster v. Overberg, 560 F.2d 735, 739 (6th Cir. 1977).

As implied in *Wagster*, it has been expressly held that *Augers* does not upset the standard announced in *Giglio* as to due process violations when the Government misconduct goes to nondisclosure of leniency agreements. *Annuziato v. Manson*, 566 F.2d 410, 414 (2nd Cir. 1977); *United States v. Sutton*, 542 F.2d 1239, 1241-42 (4th Cir. 1976). A direct and simplistic statement of when a new trial is mandated because of a denial of due process under *Giglio* appears in *United States v. Ramos Algarin*, 584 F.2d 562, 564 (1st Cir. 1978):

> This Court has construed *Giglio* to require a two-part showing before seeking retrial because of an undisclosed plea agreement. *United States v. Bynum*, 567 F.2d 1167 (1st Cir. 1978). First, the Defendant must show that there was a promise of aid made by the Government to a key witness that was not disclosed to the jury. Second, he must demonstrate that, in the language of *Giglio* and *Napue* [v. Illinois, 360 U.S. 264 (1959)], "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ."

The first part of the inquiry relates to whether there has, in fact, been Governmental misconduct and is made without consideration of impact upon the jury. If the Court determines there has been no impropriety, the inquiry ends. If, however, there is a determination that Governmental misconduct was present, the Court then goes to the second part of the test and considers whether a new trial is mandated because there is a reasonable likelihood the false testimony could have affected the judgment of the jury.

In view of this analytical method, the Court does not believe that the Government's contention that the undisclosed evidence is cumulative, defeats or impugns the Defendant showing the first part of the test (i.e., showing Government misconduct by nondisclosure of the promises made by Gibbs to Ms. Snow). We think a determination as to whether the Government acted improperly is unrelated to inquiry regarding impact upon jury. There either was an undisclosed agreement or arrangement or there was not. The Government is obliged to disclose all such agreements. We do not have here "discovery" type problems like those involved in *Brady* and *Augers*. Under the standards announced by those cases, the prosecutor's duty to disclose is in large part contingent upon the potential impact that such a disclosure would have upon the jury. We feel that failure to disclose to the jury the precise terms of an agreement in existence between a key witness and the Government amounts to Governmental misconduct.

Nevertheless, not every instance of Governmental misconduct mandates new trial. If the undisclosed evidence could not, in any reasonable likelihood, have affected the judgment of the jury, then, under *Giglio*, there is no due process violation. *United States v. Ramos Algarin*, 584 F.2d at 565. We think the Government's contention that the undisclosed plea agreement and probation recommendation was cumulative is best construed as a factor to consider in determining whether

the second part of *Giglio* has been shown, i.e., whether there is any reasonable likelihood that tne jury's judgment was affected by Blanchard's and Gibbs' testimony that, to their knowledge, there were no promises made to Blanchard by the Government. *Campbell v. Reed*, 594 F.2d at 8. Stated in a more affirmative way, the test is whether there is any reasonable likelihood that the jury's judgment would have been affected by disclosure of the promises made by Gibbs to Ms. Snow. *United States v. Ramos Algarin*, 584 F.2d at 465.

The Court is of the belief that the jury's judgment as to guilt was not, or would not be affected. The jurors here were aware of the fact that Blanchard had agreed to cooperate all along, that the Government, through the Florida United States Attorney's Office, had in fact recommended probation when Blanchard plead guilty, and that, at the time of the *Turner* trial, Blanchard still expected that the Government might make favorable suggestions to the sentencing judge if he continued to cooperate. In view of the fact that the jury had this evidence before them, the Court would be hard pressed to find there was any reasonable likelihood their judgment was affected as to Turner being guilty of all three counts charged by the non-disclosure. Therefore, even though we have found Government misconduct in failure to disclose promises made to Ms. Snow, we are not convinced that there has been a denial of due process under the standard announced in *Giglio*.

2.

Additional Findings

This, however, does not suspend further examination of granting a new trial because of Governmental misconduct. This case has some very disturbing aspects which we feel strike at the core of a system where the Government accuses, in-

vestigates and then attempts to prove criminal conduct in a Governmental Court.

We have already found that Agent Gibbs (the Government Agent in charge of Blanchard's case in Florida) did make specific promises to Mr. Snow that, in exchange for the cooperative efforts of Blanchard, he would recommend a maximum of one year imprisonment if a certain individual in Bolivia was not apprehended by the D.E.A. and, alternatively, would recommend probation if that person was apprehended. We also determined that subsequent to the first promises, Agent Gibbs had made a specific promise to Ms. Snow that he would recommend probation because the sought after individual had been apprehended. The Court believes additional findings regarding the testimony of Agent Gibbs is necessary to an illuminated and untarnished administration of justice.

Our findings compel us to conclude, of course, that Agent Gibbbs did not disclose to the jury the arrangements he made with Ms. Snow. Moreover, he did nothing to inhibit Blanchard from testifying that there were no such arrangements. We believe this nondisclosure was not the result of negligence or inadvertence. No other conclusion but that of intentional nondisclosure seems reasonable. Agent Gibbs was not merely an agent who helped arrest Blanchard or who had only ancillary contact with the Blanchard case. If his contact with the Blanchard matter was only minimal, then we might have been inclined to find that Gibbs made some passing comment or promise, and through inadvertence, forgetfulness, or negligence forgot that comment or promise at the time of trial. The fact is, Gibbs was the agent in charge of the Blanchard matter. Moreover, he maintained a continued contact with Ms. Snow over several months. From the time of Blanchard's arrest and the Turner trial, only nine months passed, hardly time enough to excuse nondisclosure because of forgetfulness. In making a factual determination, we must say no to

any deference that we might otherwise pay to an agent of the Government who has been employed to bring about justice. Gibbs' nondisclosure was intentional. We are further disturbed by two corollary conclusions of fact that flow from this determination.

First, we want to note that in *Giglio* and all the cases cited by the Defendant and the Government, the Governmental conduct related to a situation where (1) the witness testified to the absence of an agreement or promise; (2) someone who was a part of the prosecutorial team (an agent, a member of the prosecutor's staff, or the trial prosecutor himself) did in fact come to some agreement with, or make a promise to, the witness or his counsel regarding leniency; and (3) there was no affirmative act by the Government to correct the false statement that went to the jury. Here something far more distressing occurred. Gibbs' not only failed to correct the witness' testimony that, to his knowledge, no promises existed, but he took the stand himself and, under oath, intentionally failed to disclose the promise made to Ms. Snow.

Second, the Court feels it is necessary to examine the following colloquy between the Assistant United States Attorney and Agent Gibbs:

> Q. Was there any agreement relative to that exposure to Mr. Blanchard before the charge he plead guilty, if you know?
>
> A. Not to my knowledge, sir.

(12/8/78 Tr. at 25). Unfortunately, we must arrive at the distasteful conclusion that this witness, who is no ordinary witness but rather a Government agent, made a material misrepresentation on the stand. He knew of the arrangements made with Ms. Snow and specifically denied the existence of any agreement regarding exposure. It may be that Gibbs felt he could escape disclosure of the promise by construing the

word "agreement" as a Rule 11 plea bargain agreement. However, given the context in which the sentence was asked, such a construtions would be entirely unreasonable in the Court's view. This is especially true in light of the witness' experience as an agent and as a witness. Gibbs' misconduct, therefore, is composed not only of the omissive act of non-disclosure but also of affirmative conduct involving, at the least, an intentional misrepresentation made under oath.[1] In view of such findings, we address ourself to the applicability of two principles of law.

3.

Butler's Gloss On *Giglio*

Let us first look to the applicability of one of the cases most strenuously urged upon us by the Defendant. *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978). That case took a novel, and this Court believes a wise approach to *Giglio* problems. It is novel in two respects.

a.

Focus Upon Credibility of Witness

First, the *Butler* Court concluded *Giglio* language (i.e., that a new trial is mandated only when there is a reasonable likelihood that the judgment of the jury will be affected)

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[1] Although Gibbs response might not necessarily subject him to the penalties of perjury under 18 U.S.C. § 1621 (1975), *see Brownston v. United States*, 409 U.S. 352 (1973), our determination that there has been Governmental misconduct is not predicated by a finding of perjury. *Cf. United States v. Giglio*, 405 U.S. 150, 154 (1975); *Annuziato v. Manson*, 566 F.2d 410, 414 (2nd Cir. 1977).

focuses upon the quality of the evidence rather than upon outcome of the case.

> Under the interpretation of this test set out in the district judge's order, a new trial would be required only if the nondisclosure could reasonably have affected the judgment of the jury to the point of changing its verdict.
>
> This reading of the *Giglio* language, in effect collapsing the new trial standard into the ordinary one for granting new trials, is the less attractive one.
>
> The proper standard in negligent nondisclosure cases should call for a new trial wherever the nondisclosed evidence might reasonably have affected the jury's judgment of some material point, without necesarily requiring a supplemematry finding that it also would have changed its verdict. *Giglio's* "effect on the judgment of the jury" language seems to focus on the quality of the evidence rather than on the outcome of the case.
>
> This reading is supported by our holding in *Flores v. Craven*, 503 F.2d 1030 (9th Cir. Sept. 10, 1974), (memorandum for publication), where this court stated that the test under *Giglio* must be whether the nondisclosure "could have affected the trier of fact's estimation of credibility."

United States v. Butler, 567 F.2d at 889-90.

Butler requires a new trial when negligent Governmental misconduct (nondisclosure) could have a reasonable likelihood of affecting the judgment of the jury, not as to what the verdict would be, but rather, as to their assessment of the witness' credibility. Most of the other Circuits do not read *Giglio* so expansively and require a showing to the Court's satisfaction that there be a likelihood the jury's judgment as to

guilt or innocence be affected. *See, e.g., Campbell v. Reed*, 594 F.2d at 8; *United States v. Ramos Algarin*, 584 F.2d 562, 565 (1st Cir. 1978); *United States v. Anderson*, 574 F.2d 1347, 1356 (5th Cir. 1978); *Boone v. Paderick*, 541 F.2d 447, 451-53 (4th Cir. 1976).

We need not resolve the issue of whether to adopt this extreme position of the Ninth Circuit because we do not believe that the jury would have been affected in their assessment of Blanchard's credibility if the promise made by Gibbs to Ms. Snow had been disclosed. As indicated above, a great deal regarding Blanchard's relationship with the Government had already been disclosed. Additionally, because we have determined that Gibbs' misconduct was intentional, there are many issues we need not face.[2]

b.

A *Per Se* Rule for Intentional Misconduct

Second, and more importantly, *Butler* expansively interprets, and/or expands upon *Giglio* as creating two different tests for granting a new trial depending upon the degree of culpability of the Government's conduct.

> Our reading of *Giglio* requiring that [1] negligent nondisclosure situations be assessed as to whether the jury's earlier credibility assessment would have

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[2] Even if we were to adopt the *Butler* position that new trials should be granted *per se* when the nondisclosure of leniency agreements is intentional, we need not necessarily accept *Butler's* focus on the jury's judgment as to credibility of the witness rather than as to guilt or innocence of the Defendant. Similarly, we could reject the *per se* rule by rejecting the intentional/negligent destruction, yet still accept the *Butler* focus upon credibility in its reading of *Giglio*.

> been affected by the newly disclosed evidence, appears a reasonable one. Due process rights would be preserved, yet new trials would not be required in every nondisclosure situation. [2] *In those uncommon cases where prosecutorial misconduct was admitted or virtually uncontroverted, we would preserve an almost per se standard, granting new trials if the suppressed evidence would have been favorable and material" to the defense.* In the more common case of unintentional nondisclosure, prosecutors would be encouraged to disclose their full course of dealings with witnesses under our rule requiring a new trial whenever nondisclosure might have affected the jury's asessment of credibility.

Id. at 891 (emphasis added).

Because we have already assessed a new trial would not be mandated under *Butler's* expansive reading of *Giglio*, irrespective of whether we adopt the negligent/intentional distinction, we must address the question of whether to adopt a *per se* standard of granting new trials when "the suppressed evidence would have been "favorable and material" to the defense."

Let us express at the outset that the Court believes Turner should get a new trial if this standard were adopted. The test is "favorable and material to the defense." The Court takes the words "to the defense" to explicitly exclude Constitutional definitions of "material" or "materiality" used in other contexts.[3] We believe, therefore, that the promises made by

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[3] This conclusion is especially compelling in view of the following: (1) Constitutional materiality had just been exhaustively discussed by the *Butler* Court vis-a-vis negligent misconduct; (2) the Court speaks of "materiality" in the context of announcing a *per se* rule; (3) the source of this negligent/intentional distinction

Gibbs to Ms. Snow were clearly "material and favorable to the defense" as that phrase is used in Butler and explained and defined in Footnote 3, *supra*.

In examining whether to adopt *Butler's per se* type rule, it would be best to first address ourselves to any potential objections to its imposition. Primarily, it could be argued that *Augers v. United States*, 427 U.S. 97, eliminated any method of determining the materiality necessary to precipitate a new trial which varies in inverse proportion to the Government's scienter in suppressing the evidence.

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. *Cf. Giglio v. United States*, 405 U.S. 150, 154. Conversely, if evidence actually has no probative significance at all, no purpose would be

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establishing two different tests appears in *United States v. Morrell*, 524 F.2d 550, 553 (2d Cir. 1975). In that case, like this one, the Government disclosed some but not all of the evidence regarding the Government's relationship with a key witness. The Court said "[F]irst of all, the material was unquestionably favorable to the defense insofar as it bore upon the testimony of Valdez [the cooperating witness]. *Id.* at 554. (4) Additionally, the *Morrell* Court in holding that "intentionally suppressed evidence or ignored evidence of high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense." *Morrell* cited *United States v. Kahn*, 472 F.2d 272, 287 (2nd Cir.) *cert. denied*, 411 U.S. 982 (1971), which defined "materiality" as used in this context. The *Kahn* definition of this type of "materiality" has very low threshold. "[T]he materiality of the evidence is measured by the effect of its suppression *upon preparation for trial*, rather than its predicted effect on the jury's verdict." *Id.* (emphasis added).

> served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Id. at 110. In *Moynahan v. Manson*, 419 F. Supp. 1139, 1147 & n.2 (D. Conn. 1976), the Court said:

> Prior to the decision in *Augers*, the rule in the Second Circuit was the standard of materiality varied with the prosecutor's culpability. *See, e.g., United States v. Morell*, 524 F.2d 550 (2nd Cir. 1975) . . . This rule was rejected in *Augers*, however, in favor of a standard which varies according to the specificity of the request for disclosure.

The Court believes there are two reasons to reject this reading of *Augers*.

Justice Marshall, in his dissent in *Augers*, pointed out that *Augers* did not involve intentional Government misconduct and, therefore, what standard applied when such was present remained an open question. *United States v. Augers*, 427 U.S. at 121-22 & n.7 (Marshall, J., dissenting). It would appear that many courts believe that the question is in fact open because they would continue to utilize a sliding scale as to materiality when the misconduct is negligent or intentional. *See United States .v. Butler*, 567 F.2d at 890; *In Re United States*, 565 F.2d 173, 177 & n.2 (1st Cir. 1977); *Jones v. Jago*, 428 F. Supp. 405, 409 (N.D. Ohio 1977).

The second and more relevant reason for rejecting reading *Augers* as prohibiting any sliding scale of materiality based upon Governmental scienter, relates to the distinction explicitly recognized in *Augers* between cases involving perjury or other corruption of truth finding process and those involving

"discovery." *See Augers v. United States*, 427 U.S. at 120-21 (Marshall, J., dissenting). *Augers* was a "discovery" case, and did not involve matters relating to undisclosed leniency agreements. *United States v. Sutton*, 542 F.2d 1239, 1241 (4th Cir. 1976). Therefore, even if *Augers* could be read as abolishing standards varying according to the Government's culpability in "discovery" cases, we do not believe it can be read as abolishing any such distinction as to *Giglio* type circumstances.

We think that the use of a sliding scale is appropriate in *Giglio* situations and, therefore, adopt *Butler*. The Court, depending upon how culpable the Government has been, begins to focus not only upon the impact of the misconduct upon the accused's right but also upon the over-riding concern that our system of adjudicating disputes must always remain free from taint and pollution. In extreme instances of blatant Governmental misconduct, the Court's decision to grant a new trial is not so much predicated upon the accused's rights but upon a desire to prohibit agents of the Government from using the Court to secure desired convictions at any cost.

> Furthermore, our cases establish that in cases of deliberate suppression, "prophylatic consideration," designed to deter future governmental misconduct are of overriding importance.

United States v. *Morells*, 524 F.2d 550, 554 (2nd Cir. 1975).

c.

New Trials in the "Interest of Justice" or Supervisory Control

It is unclear whether the *Butler per se* rule was intended to be taken as a constitutional rule or one of supervisory control. However, that is of no import here. We have already conclud-

ed that even if there was no finding of a denial of due process, a new trial could be granted if such was necessary "in the interests of justice."

Exerpts from the concurring opinion of Judge Ely in *Butler* are particularly relevant and enlightening:

> [T]he conduct of the Government here was far below what the American people are entitled to expect from public servants entrusted with such an important aspect of the national interest.
>
> The Government . . . is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds*, 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). "[T]he interest of the [Government] is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done . . . ." Surely, conduct such as that indulged in here by the Government cannot in any imaginable way promote the just administration of the laws in the United States, and, in fact, affirmatively obstructs the pursuit of justice, the very lofty mission with which the Government is charged.
>
> All federal courts are endowed with certain inherent supervisory powers over the administration of justice in the courts of the United States and must utilize that power, which comprehends the power to dismiss an indictment, whenever the pursuit of truth and justice becomes tainted . . . "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its

observance is one of our proudest boasts. This Court is charged with supervisory functions in relating to proceedings in the federal courts. (Citation omitted). Therefore, fastidious regard for the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

I can envision few other situations that would recommend themselves more strongly than this one as candidates for the exercise of a federal court's most exalted powers to deter such prosecutorial tactics. If there is any one characteristic that glorifies our Government, it is the penchant for justice, uniformly and impartially administered. The attainment of justice has ever been the ultimate aim and purpose of honorable men . . .

There is no consideration, including zeal or inexperience that can affect this transcedent obligation. And if, during a criminal trial and subsequent hearings, federal officers sit quitely acquiescent while one of their witnesses, to their knowledge, repeatedly perjures himself in incriminating the accused, the judicial idealism of our democracy is undermined an subverted.

United States v. *Butler*, 567 F.2d at 893-94 (Ely, J., concurring). In this case, Agent Gibbs not only failed to correct Blanchard's testimony but took the stand and by his own disclosure, buttressed Blanchard's testimony that no agreements or promises existed. Moreover, he made an affirmative material misrepresentation (if he did not outright perjure himself) that no promises or agreements existed. This was an affront to the Court's dignity and honor. It was an affront to the Nation. The Government cannot make its case through the

deceptive testimony of its own agents. The Court does not believe that granting a new trial here is subject to criticism analogous to that directed at the exclusionary rule — the criminal goes free because of the constable's blunder. The culpable Governmental conduct was cooly acted out in the very sanctuary of justice, not in the passion of the streets. Accordingly, we feel a new trial is essential.

V.

OTHER ALLEGATIONS OF MISCONDUCT

The Court wants to expressly indicate that our holding is in no way contingent upon whether Mr. Andreoff knew of Gibbs' misconduct. We have not, and need not, make any determination as to that point. Indeed, there is no evidence before us to that effect, and if pressed upon the question, we would be compelled to find that Mr. Andreoff was free of any knowledge of Gibbs' activity.

Similarly, because we believe a new trial is mandated in view of Gibbs' activity, we need not, and do not, reach the issues related to Mr. Andreoff's alleged misconduct or the alleged suppression of portions of Exhibits 4 and 9.

For the foregoing reasons, the Motion filed by the Defendant for a New Trial because of Governmental Misconduct is, and shall be, GRANTED.

(s) Julian Abele Cook, Jr.
United States District Judge

Dated: June 8, 1979
Detroit, Michigan.

No. 80-760

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD A. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his retrial, following his successful motion for a new trial, is barred by the Double Jeopardy Clause of the Fifth Amendment.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess with intent to distribute and to distribute cocaine, aiding and abetting another to possess cocaine with intent to distribute it, and use of a communication facility to facilitate possession with intent to distribute and distribution of cocaine, in violation of 21 U.S.C. 846, 841(a)(1) and 843(b). Petitioner filed a motion for judgment of acquittal and a motion for a new trial, contending, *inter alia*, that his conviction was tainted by government misconduct. Specifically, petitioner alleged that the government had suppressed information indicating that it had promised one of its witnesses at petitioner's trial leniency in exchange for his testimony.

In a lengthy opinion (Pet. App. 1b-37b), the district court concluded (Pet. App. 24b-25b) that this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), required petitioner to make a two-part showing in support of his new trial request: (1) that there was, in fact, an undisclosed government promise to a key witness; and (2) that there was a reasonable likelihood that the false testimony denying the existence of such a promise could have affected the jury's judgment. With respect to the first prong of the test, the court found (Pet. App. 26b-28b) that a DEA agent who testified for the government at petitioner's trial intentionally and falsely stated that he had made no promises of leniency to another government witness. For purposes of considering petitioner's new trial request, the court imputed the agent's misconduct to the prosecution (Pet. App. 19b-20b). The court stated (Pet. App. 37b), however, that if it were necessary to decide the question, it "would be compelled to find that [the prosecutor] was free of any knowledge of [the agent's] activity."

As to the second prong of the *Giglio* test—the impact of the false testimony upon the jury—the court concluded that the jury's judgment as to petitioner's guilt could not have been affected by the agent's false testimony (Pet. App. 25b). Moreover, the district court found that disclosure of the agent's promise to the witness would not even have affected the jury's assessment of the witness's credibility (Pet. App. 30b). Nonetheless, the court granted petitioner's new trial request "in the interests of justice" (Pet. App. 34b-37b).

Following this favorable response to his new trial motion, petitioner filed a motion to dismiss his indictment, arguing that retrial was barred on double jeopardy grounds. While that motion was pending, the government petitioned the

court of appeals for a writ of mandamus, seeking reversal of the district court's new trial order. The petition was denied. The district court then rejected petitioner's motion to dismiss the indictment. The court of appeals affirmed, Judge Keith dissenting (Pet. App. 1a-3a).

2. We submit at the outset that the district court clearly erred in granting petitioner's motion for a new trial in the face of its express finding (Pet. App. 25b, 30b) that the agent's assertedly false testimony had no effect on the jury's judgment. Thus, were it not for the fact that the granting of a motion for a new trial is not appealable, that decision presumably would have been overturned, and there would have been no need to retry petitioner.

In any event, petitioner's double jeopardy claim is frivolous in the context of this case. It amounts to an assertion that any misconduct by a prosecutor, regardless of its motivation or its prejudicial consequences for the defense, bars a retrial of the defendant. Even when a conviction is properly set aside, however, there is no bar to retrial as long as the reversal is not based on any evidentiary insufficiency. *Burks* v. *United States*, 437 U.S. 1 (1978); see *United States* v. *Dinitz*, 424 U.S. 600, 610 & n.13 (1976); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896). Indeed, in *Burks* v. *United States, supra*, 437 U.S. at 15, the Court specifically stated that retrial is permitted following a reversal for trial error, "*e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, *or prosecutorial misconduct*" (emphasis added).

While the Court has suggested that there may be situations in which prosecutorial misconduct is so egregious as to bar a retrial following the granting of a defendant's motion for a mistrial (*United States* v. *Dinitz, supra*, 424 U.S. at 601; *United States* v. *Jorn*, 400 U.S. 470, 485 (1971);

United States v. *Tateo, supra*, 377 U.S. at 468 n.3), this case plainly does not present such a situation. This Court has made clear on several occasions that the type of misconduct that will bar retrial following the granting of a defendant's motion for a mistrial involves prosecutorial action *intended to provoke* the mistrial request and thereby subject the defendant to multiple prosecutions. *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980), slip op. 13; *United States* v. *Dinitz, supra*, 424 U.S. at 611; *United States* v. *Jorn, supra*, 400 U.S. at 485 n.12; *United States* v. *Tateo, supra*, 377 U.S. at 468 n.3.[1] In the present case, however, the prosecutor was not even aware that the agent had testified falsely concerning his promise of leniency to the government witness (assuming arguendo that the agent's testimony was in fact false) (Pet. App. 37b). Indeed, at trial the prosecutor directly questioned the witness about his favorable relationship with the government (see Pet. App. 20b-21b). In light of that fact, it cannot seriously be contended that the nondisclosure of the specifics of the agent's promise was an intentional tactic designed to require a retrial of the case or even that it was conduct otherwise "designed to avoid an acquittal." *United States* v. *Jorn, supra*, 400 U.S. at 485 n.12.

Moreover, in its new trial order, the district court specifically found (Pet. App. 25b, 30b) that the government's misconduct in failing fully to disclose to the jury the agent's promise to the witness had not prejudiced petitioner in any way. Indeed, the district court hardly could have found

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[1]Although, as we show below, the facts of the present case do not warrant it, it is possible that, in an appropriate case, the same argument might be made against retrial after a conviction has been set aside at the conclusion of trial.

otherwise, given that the jury already knew (1) that the witness had agreed to cooperate with the government all along, (2) that, at the time of petitioner's trial, the witness still expected that the government might make a favorable recommendation to the sentencing judge in his own case if he continued to cooperate, and (3) that the government, through the Florida United States Attorney's Office, in fact recommended probation when the witness pleaded guilty (Pet. App. 21b). In each of the cases relied on by petitioner (Pet. 9) in support of an expansive construction of the Double Jeopardy Clause following a mistrial order, however, the governmental misconduct that was held to bar retrial was found to have "seriously prejudiced" the defendant. See *United States* v. *Martin*, 561 F. 2d 135, 139-140 (8th Cir. 1977); *United States* v. *Kessler*, 530 F. 2d 1246, 1257 (5th Cir. 1976).[2] While we disagree with the holdings of those cases, they afford petitioner no aid. Here, where petitioner was specifically found not to have been prejudiced by the governmental action that was the basis for his successful new trial motion, he should not be provided with a windfall prohibiting his retrial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

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[2]In *United States* v. *Alford*, 516 F. 2d 941 (5th Cir. 1975), also relied on by petitioner (Pet. 9), the district court found that no defense request for a mistrial had been made and therefore applied the "manifest necessity" standard.